LIBRARY
SUPREME COURT, U. S.

FILED
JUL 29 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 353

ELIJAH WHITE RATCLIFF,
Petitioner,

versus

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

ELIJAH W. RATCLIFF,
Attorney At Law,
P. O. Box 391,
Livingston, Texas 77351;
Ph. 713 FA 7-4948,
Attorney for Petitioner.

INDEX.

	Page
CITATIONS TO OPINIONS AND RULINGS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	7
(Copies of statutes and rules referred to on page 7 are attached and included in Appendix E)	
STATEMENT OF CASE	8
REASONS FOR GRANTING THE WRIT	11
ARGUMENT:	
Discussion of Facts and Authorities I	12
Discussion of Facts and Authorities II	21
Discussion of Facts and Authorities III	32
Discussion of Facts and Authorities IV	36
CONCLUSION	37

INDEX TO APPENDIX.

Appendix A—Orders of refusal to grant Application for Writ of Error and overruling of Motion for Rehearing in the Supreme Court of Texas	41
Appendix B—14th Court of Civil Appeals' Notice that Motion for Rehearing was overruled	44
Appendix C—Letter of Appeal's removal to 14th Court of Civil Appeals	53
Appendix D—Letter of accompanying motion's removal to 14th Court of Civil Appeals	55
Appendix E—Constitutional, statutory, and procedural sources quoted	57

TABLE OF AUTHORITIES.

Page

Constitutional Provisions Cited:

Amendments to the Constitution of the United States—Article V 9, 10, 38, 39

Amendments to the Constitution of the United States—Article XIV, Section 1 .... 9, 10, 38, 39

Texas Constitution—Article I, Section 19 ..... 9, 11

Federal Statutes Cited:

28 U. S. C., § 2101 (c) 3

28 U. S. C., § 1257 (3) 3, 11

State Statutes and Rules Cited:

Article 1728, Subdivision 6. Vernon's Annotated Texas Statutes 10

Article 2249, Vernon's Annotated Texas Statutes 29

Article 3713, Rule 11, Vernon's Annotated Texas Statutes 24, 28, 30

Rule 67, Texas Rules of Civil Procedure 35, 36

Rule 90, Texas Rules of Civil Procedure 35, 36

Rule 166-A, Texas Rules of Civil Procedure 14

Rule 169, Texas Rules of Civil Procedure 21

Rule 353, Texas Rules of Civil Procedure 29

Rule 354, Texas Rules of Civil Procedure 29

Rule 355, Texas Rules of Civil Procedure 29

Rule 356, Texas Rules of Civil Procedure 29

Rule 386, Texas Rules of Civil Procedure 8, 29

Rule 506, Texas Rules of Civil Procedure 3

Cases Cited:

Bounds v. Hickerson, 63 SW 887 15

Bowles v. Bourdon, 219 SW2d 779 31

Cantwell v. Connecticutt, 310 U.S. 296 39

Chicago, R. I. & G. R. Co. v. Neubert, 248 SW 139 ..... 17, 27

Page

Clough v. Worsham, 74 SW 350 21
Escobedo v. Illinois, 378 U.S. 478 33
Famous Department Store v. State, 371 SW2d 76 36
Gainesville, H. & W. R. Co. v. Hall, 14 SW 259 27
Galveston, Houston & San Antonio Railroad Co. v. Harden, 236 SW 146 .....17, 21
Galveston, Houston & San Antonio Railroad Co. v. Pitts, 42 SW 255 25
Garrett v. Wichita Falls, 329 SW2d 491 .....34, 36
Gold v. Campbell, 117 SW 463 17
Gray v. Allen, 243 SW 684 .....26, 28
Hannegan v. Esquire, 327 U.S. 146 39
Harrell v. Black, 329 SW2d 127 .....16, 19, 20
Harris (A) & Company v. Caldwell, 276 SW 298 .....17, 21
Hawk v. Olson, 326 U.S. 271 12
Hodges v. Nix, 225 SW2d 576 37
Holland v. Nimitz, 232 SW 298 21
Houston & Texas City Railroad Company v. Robertson, 138 SW 822 17
Houston Fire Casualty Insurance Co. v. Walker, 260 SW2d 600 36
Hurd v. Hodge, 334 U.S. 24 39
Hussman v. Leavell & Sherman, 20 SW2d 829..23, 30
Koonce v. City of Mesquite, 382 SW2d 309 ....11, 37
Landrum v. Wells, 26 SW 1001 18
Lemons v. Davis, 306 SW2d 224 28
Mills v. Denver Tramway Corporation, 155 F2d 808 18
Missouri, Kansas & Texas Railroad Co. v. Keaveny, 80 SW 387 .....22, 26, 32
Moss v. Rishworth, 222 SW 225 16
Morse v. Woodworth, 29 NE 525 .....18, 27

Page

Muncy v. Johnston, 402 SW2d 525 22
Murry v. Brisco, 209 SW2d 976 19
Newton v. Rhoads Brothers, 24 SW2d 378 ....17, 31
Nicketta v. National Tea Company, 87 NE2d 30 15
Panola County Commissioner's Court v. Bagley, 380 SW2d 878 16
Rochin v. California, 342 U.S. 165 39
San Antonio Traction Co. v. Higdon, 123 SW 732 .....23, 28, 30
Spaulding v. Smith, 169 SW 627 .....24, 28
Stalnaker v. Howard, 230 SW2d 563 .....35, 36
State ex rel. Brass v. Carpenter, 37 NE 261 15
State v. Morgan, 170 SW2d 652 21
State v. Peeler, 200 SW2d 874 35
St. Louis & San Francisco Ry. Co. v. May, 115 SW 900 24
Texas & P. R. Co. v. Parker, 68 SW 831 19
Tumlinson v. City of Brownsville, 178 SW2d 546 21
Wagner v. Warnasch, 295 SW2d 890 19
Walling v. Richmond Screw Anchor Co., 154 F2d 780 14
Western Union Telegraph Company v. Davenport, 97 U.S. 369 15
Williams v. Kaiser, 323 U.S. 271 12
Williams v. Livingston, 113 SW 786 27
Wyche v. Works, 373 SW2d 558 .....16, 20
Young v. Masci, 289 U.S. 253 39
Zucht v. King, 260 U.S. 174 11

Textual Authority Cited:

Louisell & Williams, Trial of Medical Malpractice Cases 34

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No.

ELIJAH WHITE RATCLIFF,
Petitioner,

versus

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Elijah White Ratcliff, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in the above cause on the 15th day of May, 1968, on which a motion for rehearing, duly and timely filed, was overruled on the 5th day of June, 1968.

OPINIONS BELOW.

The Judgment of the District Court of the 56th Judicial District of Texas rendered on the 15th day of March, 1968 in Cause No. 102,754 appears at pages 25 and 26 of the Transcript from the trial Court (See Record Instrument II). A Motion for New Trial was timely filed (See Transcript pp. 32-33; Record Instrument II) but overruled by the presiding Judge.

The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas rendered January 17, 1968 is reported in 423 SW2d 614 (1968), and a copy of said opinion with letters of transferral from the First Supreme Judicial District is attached hereto as Appendix B and also appears as a part of the printed record (See Record Instrument XVIII).

The judgment of the Supreme Court of Texas of May 15, 1968 refusing Petitioner's Application for a Writ of Error is attached hereto as Appendix A, and the Clerk of the Supreme Court of Texas' Order of overruling of motion for rehearing is attached hereto as Appendix A, effective June 5, 1968 (See official Order of the Court in Record of the Supreme Court of Texas, Instrument III).

JURISDICTION.

The judgment of the Supreme Court of Texas was made on the 15th day of May, 1968, and a copy of the Order as above referred to is attached to this Petition

as Appendix A. The motion for rehearing was timely filed, and the same was denied on June 5, 1968 as shown in Appendix A attached hereto. The judgment became final on June 20, 1968 pursuant to *Rule 506, Texas Rules of Civil Procedure*, which provides that such judgments shall become final after the expiration of fifteen (15) days from the date judgment was rendered (See Record of the Supreme Court of Texas, Instrument III).

This Petition is timely filed under *Title 28, U. S. C., Section 2101 (c)*, and jurisdiction of the Supreme Court of the United States is invoked under the provisions of *Title 28, U. S. C., Section 1257 (3)* as a Petition for a Writ of Certiorari to the Supreme Court of Texas where the rights of Petitioner under the Constitution of the United States of America are being infringed upon by the actions of Respondents approved by the Supreme Court of Texas and its lower courts.

QUESTIONS PRESENTED.

The questions presented through this proceeding are whether the actions of the trial and appellate courts of Texas deny Petitioner constitutionally protected rights under the Fifth Amendment to the United States Constitution or deny Petitioner's constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner was confined to the University of Texas Medical Branch at Galveston, Texas for approxi-

mately seventy four (74) days beginning in September 1964 and terminating November 20, 1964. He was prevented, thereby, from concluding certain cases he had pending during such period and further from maintaining his general practice as an attorney at law licensed to practice in the State of Texas.

Respondent E. Ivan Bruce was the superior official among several employees of the University of Texas Medical Branch at Galveston, Texas who undertook to treat Petitioner for an alleged illness after coaxing Petitioner's father to sign a consent to treatment form used by the medical branch hospital. Respondent Truman Blocker, Jr. is the director of the University of Texas Medical Branch at Galveston, Texas who maintained the policy which permitted Petitioner to be treated without his consent.

A summary judgment was requested but without success, and the case was adjudicated in trial and appellate court proceedings through the Supreme Court of Texas resulting in errors as follows:

I. The trial Court erred in failing to grant summary judgment for Petitioner since there was no genuine issue as to a material fact on the question of whether Respondents had obtained Petitioner's informed consent prior to administering treatment to him.

II. The trial Court erred in granting summary judgment for Respondents when the uncontestable

facts established that summary judgment should have been granted for Petitioner.

III. Respondent Truman Blocker, Jr.'s conduct is distinguishable from the rule under *respondeat superior* because he was guilty of acts of nonfeasance and misfeasance by his own admission in maintaining a policy at the University of Texas Medical Branch at Galveston, Texas which permitted treatment of an individual without his consent.

IV. The trial Court perfected what must be recognized as a courtroom mockery and an effective denial of due process in the following particulars:

A. It was error for the trial Court to refuse summary judgment for Petitioner and dismiss a Respondent, who was a necessary party, prior to the trial of the suit.

B. It erred in allowing Respondent to testify without restriction on direct examination and in not ordering him to be responsive upon objection being properly made.

C. It erred in refusing to admit into evidence papers from another proceeding tending to impeach the diagnosis and medical conclusions of Respondent E. Ivan Bruce.

D. It was error for the trial Court to permit Respondent E. Ivan Bruce to read certain subjective narrative from his medical records calculated to produce prejudice against Petitioner.

E. It erred in refusing to permit Petitioner to introduce correspondence showing the unreliable character of Respondent E. Ivan Bruce's medical testimony.

F. The Court erred in refusing Plaintiff's Motion for Leave to File Amended Petition to conform to the evidence and proof presented upon the trial.

CONCLUSION: The Court of Civil Appeals and the Supreme Court of Texas erred in not reversing the trial Court's Judgment on each of the foregoing essential points of error resulting in a deprivation of Petitioner's "day in court."

V. The appellate courts of Texas erred in refusing to reverse the decision of the trial Court because of Petitioner's inability to obtain a complete record for the Court of Civil Appeals prior to submission and oral argument where such inability was not the fault of Petitioner or anyone acting in his behalf.

VI. Plaintiff's Second Amended Original Petition was adequate under law to support his case, and it was reversible error for the trial Court to refuse Plaintiff's Third Amended Original Petition offered in the interest of clarity and the "Special Issues" timely submitted.

VII. The trial Court erred in allowing any amount of testimony of Respondent E. Ivan Bruce which was

not responsive and in answer to specific interrogatories of Petitioner to be considered by the jury without permitting the impeachment evidence offered by Petitioner.

VIII. The Court of Civil Appeals' opinion, affirmed by the Supreme Court of Texas, does not reflect a recognition on the part of the courts of the points of error cited by Petitioner or an intention to view the trial proceeding as depicted by the record, and the standard of due process under the Fifth Amendment to the Constitution of the United States made applicable to the states by the Fourteenth Amendment to the Constitution of the United States is flagrantly violated.

STATUTES INVOLVED.

Article 1728 (6), Vernon's Annotated Texas Statutes—Appellate Jurisdiction; *Article 2249, Vernon's Annotated Texas Statutes*—To Court of Civil Appeals; *Article 3713, Rule 11, Vernon's Annotated Texas Statutes*—Evidence; *Rule 67, Texas Rules of Civil Procedure*—Amendments to Conform to Issues Tried Without Objection; *Rule 90, Texas Rules of Civil Procedure*—Waiver of Defects in Pleading; *Rule 166-A, Texas Rules of Civil Procedure*—Summary Judgment; *Rule 169, Texas Rules of Civil Procedure*—Admission of Facts; *Rule 353, Texas Rules of Civil Procedure*—Notice of Appeal; *Rule 354, Texas Rules of Civil Procedure*—Cost Bond; *Rule 355, Texas Rules of Civil Procedure*—Party Unable to Give Cost Bond;

Rule 386, Texas Rules of Civil Procedure—Time to File Transcript and Statement of Facts. All of the foregoing statutes and rules are set forth in full with the constitutional provisions to which they relate in this Petition for a Writ of Certiorari as Appendix E beginning at p. 57.

STATEMENT OF CASE.

The case in question was initiated as a malpractice suit in the 56th Judicial District of Texas wherein Petitioner was Plaintiff and Respondents were Defendants (See Transcript pp. 3-7; Record Instrument II).

Petitioner is an attorney at law who was practicing in Livingston, Polk County, Texas when a determination was made by certain citizens and officials of the community that he should be confined to the University of Texas Medical Branch at Galveston, Texas or Rusk State Hospital for treatment of an alleged mental disorder (See Record Instrument XII, p. 116). At the time his confinement materialized, he had cases pending in courts awaiting appellate procedural completion totaling Six hundred sixty thousand ($660,000.00) dollars (See Record Instrument XII, pp. 167-169), as well as other legal matters (See Record Instrument XII, p. 170). He was also awaiting his date to report to active duty as an officer in the U. S. Army Reserve (See Record Instrument XII, pp. 186-201).

Each case pending appellate review during the period of Petitioner's confinement was lost for failure

to comply with procedural requirements of Texas law and as a proximate cause from the wrongful confinement of Petitioner by Respondents. Many legal matters which Petitioner would have handled during the general period of time corresponding with his confinement were irreparably lost attributable to the confinement itself as well as the medicinals and treatment administered during the period of his confinement which negatively affected his ability to perform numerous functions properly after his release.

Article I, Section 19 of the Texas Constitution provides that no citizen shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by the due course of the law of the land (See Appendix E). But four out of these five rights enumerated were specifically abused by the actions of Respondents, sanctioned by the Texas judiciary resulting in a monetary loss of proceeds from cases and injury by administering drugs and treatment to Petitioner which rendered him incapable of sustained and deliberate rationality.

The same conduct is also violative of rights guaranteed by the *Amendments to the Constitution of the United States, Article V,* and *Amendments to the Constitution of the United States, Article XIV, Section 1* (See Appendix E), establishing a basis for this Petition for a Writ of Certiorari to the Supreme Court of Texas.

The trial of the instant cause in the 56th Judicial District of Texas was characterized by a mass of in-

conceivably flagrant errors to which Petitioner objected and excepted at the time of and immediately following commission (See Statement of Facts, Volume I; Record Instrument XII).

After the trial which concluded on March 15, 1967, Petitioner filed a Motion for New Trial (See Transcript pp. 32 to 34; Record Instrument II) setting forth the grounds for his motion, but which was overruled by the Court. Petitioner then proceeded to appeal through the highest Court of Texas, enumerating in detail through Appeal in the Court of Civil Appeals an Application for Writ of Error in the Supreme Court of Texas the errors by each court which were in fact violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States (See opinion of the 14th Court of Civil Appeals, Appendix A; Record Instrument XVIII); Filing of Application for Writ of Error by Clerk of the Supreme Court of Texas on February 29, 1968; Record of the Supreme Court of Texas, Instrument IV). The specific points of error are designated at page 4 of Petitioner's Application for Writ of Error in the Supreme Court of Texas (See Record; Supreme Court of Texas, Instrument IV, p. 4) and subsequently argued in conformity with and as prescribed by *Article 1728, Subdivision 6, Vernon's Annotated Texas Statutes.*

Also, it should be noted, Petitioner was unable to obtain a complete record of the trial proceedings prior to submission and oral argument by the Court

of Civil Appeals, and the Clerk of the Court of Civil Appeals refused to file the additional necessary record for subsequent consideration of the Texas judiciary which factor alone is grounds for reversal (See Record Instrument XX). *Koonce v. City of Mesquite*, 382 SW2d 309 (1964).

REASONS FOR GRANTING THE WRIT.

Under *Title 28, U. S. C., Section 1257 (3)*, the Supreme Court of the United States is authorized to review by writ of certiorari any civil or criminal case wherein a final judgment or decree has been rendered by the highest court of the State in which a controversy was adjudicated where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This Court has for decades followed the rule that an unconstitutional exercise of authority under laws which are valid are properly reviewable by the Supreme Court of the United States by writ of certiorari. *Zucht v. King*, 260 U.S. 174 (1922).

The validity of no State law is questioned, and *Article I, Section 19 of the Texas Constitution* affords the most descriptive source of the rights which Peti-

tioner seeks to have protected (See Appendix E). Petitioner's argument here as in the appellate courts of Texas is that the Constitution, statutes, rules of procedure and common law comprising Texas law were adequate to secure Petitioner equal protection of the laws if applied indiscriminately, but Respondents with the sanction of the Texas judiciary are seeking to deny Petitioner due process of law under the Fifth Amendment to the Constitution of the United States as well as the Fourteenth Amendment to the Constitution of the United States. *Williams v. Kaiser,* 323 U.S. 471 (1945); *Hawk v. Olson,* 326 U.S. 271 (1945).

ARGUMENT—DISCUSSION OF FACTS AND AUTHORITIES.

I.

In August of 1965, Petitioner filed Plaintiff's Second Amended Original Petition in Cause No. 102,754 in the 56th Judicial District of Texas naming E. Ivan Bruce and Truman Blocker, Jr., hereinafter called Respondents, as Defendants. After each party to the suit had answered, Petitioner proceeded to take written interrogatories of John W. Ratcliff and County Judge E. C. Matthews then of Livingston, Polk County, Texas. Both gave testimony indicating in substance that Petitioner was confined to the University of Texas Medical Branch at Galveston, Texas without his personal consent, but pursuant to Respondents' efforts and the efforts of other unauthorized individ-

uals who, in addition to their lack of authority to have Petitioner confined to the medical facility, were not in a position to determine the presence or absence of a necessity for the treatment proposed by Respondent E. Ivan Bruce; nor were such other persons in a position to determine the presence or absence of a need for the treatment and medicinals in fact administered to Petitioner. These interrogatories appear in Volume I of the Statement of Facts (See Record Instrument XII, pp. 113-120) and in addition to the ones mentioned, interrogatories were propounded to Respondent E. Ivan Bruce who answered that Petitioner was referred to him by Dr. T. L. Gardner of Livingston, Texas as a mental patient, but it is not proposed that Petitioner had sought treatment from Dr. Gardner, or that Dr. Gardner had undertaken an examination of Petitioner. The latter interrogatory is not a part of the Record, to Petitioner's regret on the issue in summary judgment, but its substance is repeated on direct examination of Respondent Bruce (See Statement of Facts, Volume I, Instrument XII, pp. 39-41).

A Request for Admission of Facts was submitted to Respondent Truman Blocker, Jr., inquiring whether as Executive Director of the University of Texas Medical Branch at Galveston, Texas, it was consistent with his policy to admit a patient without the patient's consent, and his response was to inform the Court under oath that it was his policy to allow such a practice. This Request for Admission of Facts is to be found in the transcript at pp. 18-22 (See Record Instrument II).

Following the filing of the aforementioned interrogatories and admissions, the Court heard motions for summary judgment in behalf of the parties to the suit as shown at pages 3 through 7 and 11 through 23 of the Transcript on file in this proceeding (See Record Instrument II). Petitioner's position is that based upon the affidavits, including his supporting affidavit that he was confined to the University of Texas Medical Branch at Galveston, Texas during the calendar year 1964 without his consent, and the sworn interrogatories and admissions on file at the time of the summary judgment hearing (See Transcript, p. 8; Record Instrument II), he was entitled to a judgment for the amount of his pending cases at the beginning of his confinement period, as a matter of law, totaling Six hundred sixty thousand ($660,000.00) dollars (See Statement of Facts, Volume I; Record Instrument XII, pp. 166-170) since no genuine issue as to any material fact was raised on this point. Trial on the merits would have then been limited to damages resulting from the medicinals and treatment administered during Petitioner's confinement and from his absence from a progressing legal career. *Rule 166-A, Texas Rules of Civil Procedure; Walling v. Richmond Screw Anchor Company*, 154 F2d 780 (1946).

The false imprisonment of Petitioner resulting in the loss of his pending cases sets a unique precedent. Respondents' liability for their wrongful conduct in refusing to allow Petitioner to proceed to an appropriate termination of his pending suits is tantamount to the legal responsibility where a corporation re-

neges its obligation to issue a stock certificate to an individual stockholder who has fully paid for his interest in the corporation. *State ex rel. Brass v. Carpenter*, 37 NE 261 (1894). The measure of damages in both instances is the restoration of the individual to the same financial position he would have possessed in the absence of wrongful conduct on the part of the responding party. *Bounds v. Hickerson*, 63 SW 887 (1901).

The issue of value in all instances is remote and a matter of extreme controversy for academic purposes, but as a matter of law, value must be determined from the best available evidence. Where lost stock is involved, the law requires reference to the books of the corporation to determine its value, *Western Union Telegraph Company v. Davenport*, 97 U.S. 369 (1878), and the reasonable source of reference to determine the value of suits lost as a direct result of the wrongful conduct of second parties is the court records indicating the amount which was in controversy. This seems especially reasonable in an instance such as our present fact situation where the Respondents destroyed Petitioner's means for proving the specific elements and errors supporting his cases by chemically removing his detailed recollection of the facts and illegalities upon which his causes were based. *Nicketta v. National Tea Company*, 87 NE2d 30 (1949).

A summary judgment for Petitioner against both Respondents would not have deprived them of any statutory, constitutional or common law right since

there was no genuine issue as to any material fact with respect to the false imprisonment element of this malpractice suit. *Wyche v. Works*, 373 SW2d 558 (1963). Even though the primary factor in a summary judgment proceeding of whether there is a genuine issue of fact is viewed in a light most favorable to the party opposing the motion, *Panola County Commissioner's Court v. Bagley*, 380 SW2d 878 (1964), a court should not forsake the ultimate objective of such proceedings which is to limit the issues to be tried in a case. *Harrell v. Black*, 329 SW2d 127 (1959). The failure of the court to limit the issues in our instant case served to further confuse the jury in their deliberations and made the possibility of returning a fair and impartial verdict remote to Petitioner's detriment. Any consent obtained from John W. Ratcliff, the father of Petitioner, had no consequence with regard to the legal responsibility owed to Petitioner by Respondents to obtain his personal consent prior to administering medicinals and treatment to him and their liability flowing from the forcible treatment and confinement of him. Similarly, the reference from Dr. T. L. Gardner of Livingston, Texas, had no mitigating legal significance because Petitioner was not one of his patients and had not been examined or seen by Dr. Gardner prerequisite to the reference. Thus, the undertaking of Respondents in confining and treating Petitioner was an assault upon and a false imprisonment of him, *Moss v. Rishworth*, 222 SW 225 (1920), resulting in damages as a matter of law to the extent of his pending cases or Six hundred sixty thousand ($660,000.00) dollars and to an in-

definite degree resulting from the treatment and medicinals administered to Petitioner.

The acts of malfeasance and nonfeasance on the part of Respondents constituted a wrongful interference with the personal freedom of Petitioner and a restraint of his physical liberty amounting without doubt to a false imprisonment of him under well established principles of law within this jurisdiction. *A. Harris & Company v. Caldwell, et al.*, 276 SW 298 (1925); *Galveston, Houston & San Antonio Railway Company v. Harden*, 236 SW 146 (1922). The aforementioned and described illegal conduct on the part of Respondent E. Ivan Bruce was willful and intentional in placing Petitioner in a position where he could not exercise his will to go where he lawfully preferred, *Newton v. Rhoads Brothers*, 24 SW2d 378 (1930), for which Petitioner is entitled to be compensated, *Gold v. Campbell*, 117 SW 463 (1909), and the characterization of Respondent Truman Blocker, Jr.'s conduct, derived from his failure to establish a legal policy on admission of patients to the medical branch, makes it no less wrongful.

It is also immaterial that the conduct of Respondents did not purport to be a legal arrest, *Houston & Texas City Railroad Company v. Robertson*, 138 SW 822 (1911), since the activities and policies which they jointly effectuated were calculated to unlawfully detain, intimidate and restrain Petitioner from moving beyond designated bounds and, thus, a false imprisonment, *Chicago, R. I. & G. R. Co. v. Neubert*, 248 SW 139 (1923).

If the fact that one is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, it is duress, the issue being whether his liability to imprisonment was used against him, by way of a threat, to force a settlement, *Morse v. Woodworth*, 29 NE 525 (1891). This case cannot be significantly distinguished from our instant facts relating to the role of Petitioner's father since no motive is presented which could conceivably have driven John W. Ratcliff to direct harmful treatment of his son, Petitioner, even if he had been authorized to take steps in Petitioner's stead. The obvious conclusion is that he signed the consent to treatment form under pressure attributable to Respondents (See Consent Form: Medical Record of Elijah White Ratcliff in Volume I, Statement of Facts; Record Instrument XII, p. 47). Judicial Notice of the standard use and manner of executing consent forms in Texas and the United States should have been taken by each lower court. *Mills v. Denver Tramway Corporation*, 155 F2d 808 (1946).

The cases Petitioner had pending on the appellate level had to be acted upon within a period which was less than the duration of his confinement. The law places liability on Respondent E. Ivan Bruce for the foreseeable consequences of his acts, and the matters in question relating to Petitioner's law practice could have been discovered, at least generally, through the exercise of reasonable diligence. *Landrum v. Wells*, 26 SW 1001 (1894); *Texas & P. R. Co.*

v. Parker, 68 SW 831 (1902). There is no proof that Respondent Truman Blocker, Jr., actively and personally participated in the assault upon and false imprisonment of Petitioner, but his liability stems from negligence in the establishment and maintenance of a policy which allows the treatment of an individual without the legal consent of the individual as conceded by him in his Response to Plaintiff's Request for Admission of Facts on file at pages 21 through 23 of the Transcript (See Record Instrument II). This response was on file when the summary judgment was considered by the trial Court, and the failure of the 56th Judicial District Court to grant Petitioner's motion against both Respondents to the extent of Petitioner's pending cases at the time of the confinement was error. *Harrell v. Black*, 329 SW2d 127 (1959).

Petitioner's first point of error in the Court of Civil Appeals (See Record of the Supreme Court of Texas, Instrument IV, p. 4) was that the lower Court erred in granting summary judgment for Respondent Truman Blocker, Jr., which was fundamental error apparent upon the face of the record, and the Court of Civil Appeals, as well as subsequently the Supreme Court of Texas, should have reversed the ruling of the trial Court on this point. *Murry v. Brisco*, 209 SW 2d 976 (1948); *Wagner v. Warnasch*, 295 SW2d 890 (1956). Judgment, on the contrary, should have been rendered in favor of Petitioner against both Respondents. Such summary judgment would not have deprived either Respondent Bruce or Respondent Block-

er of any statutory, constitutional or common law right since there was no genuine issue as to a material fact with regard to the false imprisonment element of this malpractice suit. *Wyche v. Works*, 373 SW2d 558 (1963).

Respondents were not the moving parties in the summary judgment proceeding initially. Petitioner moved for summary judgment, but in reply to his motion, Respondents each requested summary judgment. Petitioner's motion was accompanied by a supporting affidavit which showed conclusively that he was entitled to damages in the amount of Six hundred sixty thousand ($660,000.00) dollars as a consequence of his false imprisonment and showed presumptively his additional damages resulting from the wrongful administering of drugs and therapy by Respondents. *Harrell v. Black*, 329 SW2d 127 (1959) (See Transcript, pp. 11-13; Record Instrument II). It is also noteworthy that the absence of written motions for summary judgment by Respondents should presumptively support Petitioner's position that summary judgment for Respondent Truman Blocker, Jr., and the denial of summary judgment for Petitioner constitute fundamental reversible error. *Wyche v. Works*, 373 SW2d 558 (1963). Respondent Truman Blocker, Jr.'s liability is predicated upon his admission of the fact that Petitioner's confinement to the University of Texas Medical Branch at Galveston, Texas without consent was consistent with the policy Respondent Truman Blocker, Jr., has allowed to prevail as administrator and chief policy maker at the medical in-

stitution. Such a policy falls short of the requirements of law. *A. Harris & Company v. Caldwell, et al.*, 276 SW 298 (1925). No further effort was made to determine the connection of Respondent Truman Blocker, Jr., with the wrongful conduct against Petitioner following his dismissal from the suit, but his liability is a matter of law based upon admissions. *Galveston, Houston & San Antonio Railroad Company v. Harden*, 236 SW 146 (1922). *Rule 169, Texas Rules of Civil Procedure.*

Petitioner concedes that the doctrine of *respondeat superior* is not generally applicable to a state official operating in his official capacity, but when the negligent act complained of is an act of nonfeasance or misfeasance personally committed by the state official, such state official is liable for the reasons mentioned heretofore which are distinguishable from *State v. Morgan*, 170 SW2d 652 (1943); *Tumlinson v. City of Brownsville*, 178 SW2d 546 (1944), and *Clough v. Worsham*, 74 SW 350 (1903), upon which Respondents rely (See Record Instrument XV, p. 7). Fundamental error not assigned is available in the Supreme Court of Texas if it is apparent upon the face of the record and made a point of error in the Supreme Court of Texas. *Holland v. Nimitz*, 232 SW 298 (1921).

II.

The ultimate Judgment of the District Court was a product of prejudice resulting from the erroneous admission of certain evidence over the timely objec-

tions of Petitioner and the exclusion of other evidence which was offered by Petitioner and in fact relevant.

Petitioner urges this Court to review, generally, what the trial Judge, the Attorney for Respondent E. Ivan Bruce, and Respondent E. Ivan Bruce, personally, prefected to be a courtroom mockery (See Motion for New Trial, pp. 32-33 of Transcript; Record Instrument II). *Muncy v. Johnston*, 402 SW2d 525 (1966).

The following describes the pattern of errors in the admission of evidence during the testimony of Respondent E. Ivan Bruce and during the trial Court litigation overall. He was asked a series of questions by Petitioner as the first witness to take the stand during the presentation of Petitioner's case which he refused to answer properly and directly at page 74, Volume I of the Statement of Facts (See Record Instrument XII). He would convert each answer into a lecture on matters not germane to the suit. He was instructed by the Court to discontinue this pattern of response, after Petitioner's objection, but his manner of being unresponsive to the questions asked continued, and the Court refused to again instruct the witness to be responsive as is apparent from Volume I, page 74 of the Statement of Facts (See Record Instrument XII). He, also, refused to meaningfully instruct the jury to disregard the specific irrelevant and unresponsive testimony resulting in prejudice to Petitioner's case before the jury. *Missouri, Kansas & Texas Railroad Company v. Keaveny*, 80 SW 387 (1904).

At page 82 of Volume I of the Statement of Facts (See Record Instrument XII), it is shown that Petitioner inquired of Respondent Bruce, who was on the witness stand, about the source of his consideration for treating Petitioner at the University of Texas Medical Branch in Galveston, Texas. The question was intended to determine the exact relationship believed to exist between Petitioner and Respondent Bruce at the time of confinement. It was deemed pertinent to discover whether a true doctor-client relationship was contemplated by Respondent Bruce, or if Petitioner was a mere subject for investigative purposes with the doctor-client relationship existing between Respondent Bruce and the source of his consideration. The attorney for Respondents objected to the inquiry, and it was sustained. Petitioner excepted for the reasons given, and maintains that the ruling of the Court constitutes reversible error. *Hussman v. Leavell & Sherman*, 20 SW2d 829 (1929); *San Antonio Traction Company v. Higdon*, 123 SW 732 (1910).

In Volume I, page 101, of the Statement of Facts (See Record Instrument XII), Petitioner excepted to the Court's sustaining of Respondent's objection to the admission of Petitioner's and Respondent's Briefs in Wyatt v. Jones; No. 6900; Ninth Supreme Judicial District. *San Antonio Traction Company v. Higdon*, 123 SW 732 (1910). The Briefs were filed in an Appeal from the 9th Judicial District of Texas with Judge Earnest Coker presiding, the same Judge who made the recommendation that Petitioner should be confined, and who presided over the case involving min-

isters pending at the time of Petitioner's confinement to the medical facility in question (See Volume II, Statement of Facts; Record Instrument XIII, pp. 5-32). The proceeding in which the Briefs were filed was subsequent to Petitioner's release from the University of Texas Medical Branch in Galveston, Texas, and upon having them admitted into evidence, Petitioner could have proceeded to establish that Respondent E. Ivan Bruce's reliance on the recommendation of Judge Earnest Coker was wrongful since he should have known, or discovered, that Judge Coker has unbending preconceived unfavorable notions about Negroes with business objectives as goals which render him unworthy of evaluating their conduct when such matters are to be affected. The case involved another Negro in Polk County, Texas who undertook to develop a profit making enterprise, and who encountered difficulties under a certain contract with a white pulpwood agent also from Polk County, Texas. The evidence clearly established a breach of contract on the part of the agent, but Judge Coker read additional facts into the case to defeat the interest of the Negro undertaking a profitable pulpwood endeavor. The Briefs were admissible under *Article 3713, Rule 11 of Vernon's Annotated Texas Statutes* since the original documents were filed in the Ninth Supreme Judicial District in Beaumont, Texas, and were out of reach of a *subpoena duces tecum*. *Spaulding v. Smith*, 169 SW 627 (1914); *St. Louis & San Francisco Ry. Co. v. May*, 115 SW 900 (1909).

The admission of the requested evidence would have substantiated Petitioner's position that the reliance by Respondent E. Ivan Bruce on the recommendation of District Judge Earnest Coker as well as that of County Judge E. C. Matthews was an act of malpractice.

At page 104, Volume I of the Statement of Facts (See Record Instrument XII), Respondent E. Ivan Bruce offered into evidence the pleadings in Ratcliff v. Sagee, et al.; No. 7312; 9th Judicial District of Texas, and at page 109, Volume I of the Statement of Facts (See Record Instrument XII), Respondent Bruce offered into evidence the pleadings in Ratcliff v. Walker, et al.; No. 7405; 9th Judicial District of Texas. Petitioner objected to the admission of the pleadings in both cases because the proper predicate had not been laid. *Galveston, Houston & San Antonio Ry. Company v. Pitts*, 42 SW 255 (1897). Petitioner does not contest the appropriateness of the evidence for other purposes such as the issue on value of cases pending, but as presented, it had the effect of presenting the ultimate issues in the suit out of proper prospective resulting in prejudice to Petitioner on the issue of whether, under the facts, it was negligent for Respondents to treat Petitioner with the medicinals and devices used. The fact that Defendants in both cases were ministers and law enforcement officers, respectively, served to throw the issues out of context.

Petitioner objected to the admission of a totally inadmissible document at page 158, Volume I of the Statement of Facts (See Record Instrument XII). Respondent E. Ivan Bruce offered a letter written by Petitioner to him immediately after Petitioner's release from the University of Texas Medical Branch at Galveston, Texas requesting an earlier appointment than the one shown by his appointment card from Respondent Bruce. Petitioner objected to the evidence on the ground that the letter was irrelevant since, when written, Petitioner was under the acute influence of the medicinals administered at John Sealy Hospital; he had no recollection of the facts surrounding his treatment by Respondent Bruce; he was not cognizant of how his confinement at the University of Texas Medical Branch at Galveston, Texas occurred and was merely making an instinctive response to the appointment card Respondent E. Ivan Bruce had given him based on sensations then present without the mental ability to grant legal ratification. *Gray v. Allen*, 243 SW 684 (1922).

Along this same line of questioning (See Record Instrument XII, p. 160), Petiitioner objected to a question in behalf of Respondent E. Ivan Bruce asking whether Petitioner's contention was that his parents put him into the aforementioned confinement without his consent because the question was irrelevant, *Missouri, Kansas & Texas Railroad Company v. Keaveny*, 80 SW 387 (1904), since their actions did not have the effect of putting Petitioner in the hospital but were instances of acquiescence in confinement as a

product of duress. *Morse v. Woodworth*, 29 NE 525 (1891); *Chicago, R. I. & G. R. Co. v. Neubert*, 248 SW 139 (1923). The Court again sustained Respondent E. Ivan Bruce's position over Petitioner's timely objection and exception.

Litigating the same issue further at page 178, Volume I of the Statement of Facts (See Record Instrument XII), Respondent E. Ivan Bruce was asked whether Petitioner "consented to undergoing the diagnostic procedures" by the Attorney for Respondents. Petitioner objected to the question as calling for a legal conclusion of a witness, but the objection was overruled, and Petitioner excepted to the Court's action in allowing the witness to answer, "he did." It is Petitioner's argument that an opinion of a witness upon a matter involving a mixed question of law and fact is not admissible in evidence over a timely objection. *Gainesville, H. & W. Railway Company v. Hall*, 14 SW 259 (1890); *Williams v. Livingston*, 113 SW 786 (1908).

At page 171, Volume I of the Statement of Facts (See Record Instrument XII), Petitioner excepted to the trial Court's refusal to admit into evidence a series of letters from reputable psychiatrists from the State of Texas who refused to serve in the case and give testimony relating to the effect of the medicinals and drugs administered to him. The evidence would have tended to impeach certain testimony of Respondent E. Ivan Bruce, as a member of their special profession within the State, with regard to his

assertions on the appropriateness and effect of the medicinals and treatment given Petitioner. The letters were admissible under law prescribed by *Article 3713, Rule 11, Vernon's Annotated Texas Statutes*, since each of the physicians as well as the original instruments sought were outside the trial Court's jurisdiction. *Spaulding v. Smith*, 169 SW 627 (1914). This offer was repeated at page 207, Volume I of the Statement of Facts (See Record Instrument XII), but the Court sustained Respondent Bruce's objection to the admission of the letters to which Petitioner excepted for the evidence was deemed relevant to impeach the testimony of Respondent E. Ivan Bruce and further establish negligence on the part of him. *San Antonio Traction Company v. Higdon*, 123 SW 732 (1910).

After direct and cross-examination of Respondent E. Ivan Bruce was concluded, Petitioner read into evidence the written interrogatories of John W. Ratcliff, E. C. Matthews and Elijah White Ratcliff included in Volume I of the Statement of Facts (See Record Instrument XII, pp. 113-125), each contributing to establish the absence of consent by Petitioner to the introduction of medicinals and treatment by Respondents to him, but that such treatment as well as medicinals were administered forcibly initially and continued while Petitioner was under the influence of pharmaceuticals and legally incapable of granting consent. *Gray v. Allen*, 243 SW 684 (1922); *Lemons v. Davis*, 306 SW2d 224 (1957). It is Petitioner's point that the interrogatories taken established conclusive-

ly liability on the part of Respondent E. Ivan Bruce and corresponding liability on the part of Respondent Truman Blocker, Jr., for damages resulting from the assault and false imprisonment of Petitioner, the measure of damages flowing from the wrongful confinement being the amounts in controversy in the cases Petitioner had pending that he lost during such confinement as reflected by the petitions and notices of appeal admitted into evidence as "Plaintiff's Exhibits," to be found in Volume I of the Statement of Facts, and which amounts totaled Six hundred sixty thousand ($660,000.00) dollars (See Record Instrument XII, pp. 113-125). *Article 2249, Vernon's Annotated Texas Statutes*, and *Rules 353, 354, 355 and 356, Texas Rules of Civil Procedure*, set forth the prerequisites for an appeal to be taken, and *Rule 386, Texas Rules of Civil Procedure*, establishes a time limitation for filing the record in a Court of Civil Appeals. It is not contestable that the Respondents precluded Petitioner's compliance with the cited procedural requirements (See Appendix E).

Also, it should be emphasized that the correspondence between Petitioner and psychiatrists in the State of Texas mentioned previously which was not admitted into evidence but is a part of the record showed a "hands off" policy assumed by each and an unwillingness to be associated with the case and give testimony in spite of an assurance of adequate compensation. It is Petitioner's conviction that such responses, considered in conjunction with the stature of influence of the University of Texas Medical

Branch at Galveston, Texas, would have tended to impeach the testimony of Respondent E. Ivan Bruce as unreliable since there was a blanket refusal of his associates throughout the State to cooperate by granting their services to Petitioner in the development and presentation of his case. Such letters, accumulated in the normal course of Petitioner's law practice, were admissible to show the truth of the relevant matters stated therein since the primary evidence was outside the jurisdiction of the trial Court (See Record Instrument XIII, pp. 12-17e). *Article 3713, Rule 11, Vernon's Annotated Texas Statutes; San Antonio Traction Company v. Higdon,* 123 SW 732 (1910). Although it may be a mere link in the entire chain of evidence concerning a principal issue, evidence is deemed relevant if it tends to prove or disprove any fact in issue, or if it is capable of affording any reasonable presumption or inference as to the principal matter in dispute. *Hussman v. Leavell & Sherman,* 20 SW2d 829 (1929).

The letters which were offered into evidence by Petitioner, if considered by the appellate courts, would have shown that the trial Court erred in allowing the testimony of Respondent E. Ivan Bruce to stand alone without permitting evidence to be introduced for impeachment purposes. This is especially true since some of the testimony given by Respondent E. Ivan Bruce was contrary to common and documented medical knowledge relating to experimental drugs and the effect of certain treatments on one's memory and coordination (See cross-examination of E. Ivan Bruce

in Volume I, Statement of Facts, p. 109, line 14; also pp. 205 to 206; Record Instrument XII). These factors raised issues of negligence within the contemplation of *Bowles v. Bourden*, 219 SW2d 779 (1949), even though the ruling of the Court in refusing to admit the letters into evidence precluded full development of the negligence and proximate cause issues, as well as more remotely false imprisonment as it relates to duress, *Newton v. Rhoads Brothers*, 24 SW2d 378 (1930), for expert testimony would have shown that the necessary warnings of the effects and consequences to Petitioner were not given Petitioner's father who signed the consent to treatment form of the hospital facility without consulting Petitioner (See Consent Form: Medical Record of Elijah White Ratcliff in Volume I, Statement of Facts; Record Instrument XII, p. 47).

Finally, among the errors which Petitioner has viewed as inconceivably flagrant was the admission into evidence, over the timely objection of Petitioner, of certain narrative from the medical records of Petitioner by Respondent Bruce at pages 181 to 192 of Volume I, Statement of Facts (See Record Instrument XII). This occurred after Petitioner had rested and Respondent Bruce took the stand in behalf of his case. He again was allowed to lecture to the jury in spite of Petitioner's timely objection further prejudicing Petitioner's case since the statements asserted were not relevant. They dealt with Petitioner's attitude toward ministers, his response to comments about his grandfather, his sexual habits and other irrelevant matters having no material factual basis

and alluded to for the purpose of evading Petitioner's case. To be relevant, evidence offered must correspond to the allegations of the pleadings and be confined to issues made by them, *Missouri, Kansas & Texas Railroad Company v. Keaveny*, 80 SW 387 (1904), but Respondent E. Ivan Bruce failed to relate the narrative from his medical records of Petitioner to any issue raised by the pleadings either directly or remotely and did not attempt to establish a factual basis for the conclusions pronounced through narrative. Consequently, his product, the medical records of Petitioner, did not resemble a genuine effort by a professional to relate the facts to medical conclusions and the evidence to legal or medical issues resulting in a hopelessly prejudiced case against Petitioner, *Missouri, Kansas & Texas Railroad Company v. Keaveny*, 80 SW 387 (1904).

III.

Petitioner had the Clerk of the District Courts of Galveston County, Texas to issue a *subpoena duces tecum* for Respondent E. Ivan Bruce, who is a physician and psychiatrist at the University of Texas Medical Branch at Galveston, Texas, to appear as a witness in Cause No. 102,754 in the 56th Judicial District of Texas and bring with him all medical records on file with the University of Texas Medical Branch at Galveston, Texas of Elijah White Ratcliff, Petitioner (See Volume I, Statement of Facts, p. 46; Record Instrument XII). He purported to comply with the directive, and among the materials brought was a medication chart of the various and sundry medic-

inals and treatments administered to Petitioner during his confinement to the medical facility from September 3, 1964 through November 20, 1964 (See Record Instrument XII, pp. 53-67) and nurse's notes showing the reaction of Petitioner to these medications (See Record Instrument XII, p. 68). The Court admitted the medication chart with its contents into evidence at pages 53 through 67 of Volume I, Statement of Facts (See Record Instrument XII) when offered by Petitioner, and Respondent E. Ivan Bruce admitted upon direct examination the danger inherent in being administered such medicinals and treatment. Respondent Bruce, also, admitted that a consequence of their use could be an individual's death (See Record Instrument XII, p. 200), or other lesser negative effects. He stated erroneously, however, upon cross-examination, that none of the drugs were in the experimental stage when used (See Record Instrument XII, p. 206). In any event, the time for disclosure is prior to treatment and before harm has resulted. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

Petitioner's response to written interrogatories appearing in Volume I of the Statement of Facts (See answers of Elijah White Ratcliff to interrogatories; Record Instrument XII, pp. 120-125) was that he had encountered difficulty in coordinating himself and suffered a loss of memory as well as an impairment of his ability to memorize following his confinement to the University of Texas Medical Branch at Galveston, Texas. The testimony of John W. Ratcliff, the

father of Petitioner, in Volume I of the Statement of Facts (See Record Instrument XII, pp. 116-120) revealed that the possible consequences of the medicinals and treatment used at the direction of Respondent E. Ivan Bruce had not been disclosed to the father, and he did not presume a dangerous undertaking by Respondents, or an undertaking which would separate Petitioner from his law practice for in excess of two months. The testimony of Respondent Bruce considered most liberally in support of his case does not reflect that informed consent requirements were met, and this conclusion is further substantiated by the previously discussed answers of Petitioner and his father.

Such testimony coupled with the evidence admitted from the medication charts of Petitioner, with accompanying nurse's notes, raised a substantial issue of damages resulting from negligence in administering the medicinals and treatment which was genuine in addition to the issues of assault and false imprisonment, also discussed previously. *Louisell & Williams, Trial of Medical Malpractice Cases, Paragraphs 4.17 and 8.09.* Therefore, in the interest of clarity, Petitioner filed a Motion for Leave to File an Amended Petition with Plaintiff's Third Amended Original Petition attached thereto at page 208, Volume I of the Statement of Facts (See Record Instrument XII) in order to conform the pleadings to the evidence and proof presented upon the trial. *Garrett v. Wichita Falls*, 329 SW2d 491 (1959). The Court refused to grant Petitioner's motion further minimizing Petitioner's

case since under the pleadings as they remained, the jury was not allowed to consider the elements and issues of negligence on the part of Respondents as the evidence and proof had established. *State v. Peeler*, 200 SW2d 874 (1947).

The Request for Preparation of Record submitted by Petitioner to the Clerk of the District Courts of Galveston County, Texas and to the Official Court Reporter of the 56th Judicial District of Texas (See pp. 36 through 38 of Transcript; Record Instrument II) sought to include the originals of the Motion for Leave to File an Amended Petition with Plaintiff's Third Amended Original Petition attached as well as Plaintiff's Special Issues in the appellate record but without attainment of the desired goal.

Rules 67 and 90, Texas Rules of Civil Procedure, would have established grounds for the jury to consider the issues submitted by Petitioner in spite of the Court's ruling on the point of amendment, but the disallowance of Petitioner's motion coupled with the Court's refusal to submit Petitioner's requested special issues covering specific negligence, intent, and damages was reversible error. *Stalnaker v. Howard*, 230 SW2d 563 (1950).

Plaintiff's Second Amended Original Petition (See Transcript, pp. 3-4; Record Instrument II) sets forth sufficient facts to establish a medical malpractice suit in that it alleges the official duties of Respondents who are physicians, and that their conduct was

wrongful and violative of the medical standards required for this jurisdiction. A more detailed allegation than presented was not a legal requirement of procedure, *Rule 90, Texas Rules of Civil Procedure*, but Petitioner offered Plaintiff's Third Amended Original Petition for filing in the interest of clarity (See Volume I, Statement of Facts, p. 20; Record Instrument XII), and in order to conform the pleadings to all aspects of the evidence and proof presented during the trial. *Rule 67, Texas Rules of Civil Procedure; Garrett v. Wichita Falls*, 329 SW2d 491 (1959).

It was within the trial Court's discretion to allow the trial amendment, *Famous Department Store v. State*, 371 SW2d 76 (1963), and it was an abuse of its discretion to refuse the special issues requested by Petitioner which were proper under either Plaintiff's Second Amended Original Petition or Plaintiff's Third Amended Original Petition (See Transcript "Supplemental," p. 3, Special Issues 1 through 18; Record Instrument XX). *Stalnaker v. Howard*, 230 SW2d 563 (1950).

IV.

Petitioner concedes that only in exceptional cases is a party entitled to reversal of a trial Court's judgment in the absence of a statement of facts. *Houston Fire Casualty Insurance Company v. Walker*, 260 SW2d 600 (1953). But where the record shows that all prerequisites to obtaining a complete record

have been complied with by the appealing party (See Transcript pp. 36-38; Transcript filing date, Transcript cover; Statement of Facts filing date, Statement of Facts cover; Record Instrument XII), the presumption that the record is complete has been rebutted (Also see Record of the Supreme Court of Texas, Instrument I seeking Writ of Mandamus). Furthermore, since a supplemental transcript containing the essential evidence desired in a statement of facts was presented before the motion for rehearing was ruled upon by the Court of Civil Appeals, it was improper for that court to overrule Petitioner's motion or for the Supreme Court of Texas to deny writ of error without considering such supplemental transcript, and the circumstances surrounding its delay which were within each court's knowledge through the record as well as accompanying petitions for a writ of mandamus to compel issuance of a complete record for filing with the Court of Civil Appeals numbered 37 in the 14th Court of Civil Appeals and B-241 in the Supreme Court of Texas (No. 37 not included by Clerk; Record of the Supreme Court of Texas, Instruments I and II). *Hodges v. Nix*, 225 SW2d 576 (1950). It is decided in Texas that a party deprived of a complete record material to his appeal without fault or negligence of himself or his counsel is entitled to reversal of the judgment for which he appealed. *Koonce v. City of Mesquite*, 382 SW2d 309 (1964).

CONCLUSION.

The cause hereby reviewed developed to be a courtroom mockery characterized by the trial

Court's flagrant disregard for well established procedural and substantive legal requirements to the detriment of Petitioner, and the Judgment entered by the 56th Judicial District of Texas should be reversed by ruling that as a matter of law Petitioner is entitled to recover the total of the amounts in controversy in cases pending and lost while he was illegally confined to the University of Texas Medical Branch at Galveston, Texas, which equals Six hundred sixty thousand ($660,000.00) dollars, and the case should be remanded for the trial Court to determine the extent of Petitioner's damages resulting from the wrongful assault by Respondents and the negligence of Respondents toward Petitioner at the time of and during his confinement to the previously mentioned institution.

The Texas Constitution, statutes, rules of procedure and common law are and since his cause of action was created have been adequate to provide the legal protection of basic rights sought by Petitioner, but as applied to the immediate facts in issue, an arbitrary infringement upon rights guaranteed by the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States was initiated by Respondents and affirmed by the Texas judiciary.

Petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted and the Judgment of the District Court, sanctioned by the Court of Civil Appeals and the Supreme Court of

Texas, reversed and remanded for adjudication of the remaining issues. This position is predicated on the fact that the courts of Texas have failed to afford Petitioner the degree of basic and fundamental fairness guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America as measured by the procedural and substantive legal requirements within the jurisdiction of Texas which unconstitutional action consisted of depriving Petitioner of liberty and property rights without due process of law. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hurd v. Hodge*, 334 U.S. 24 (1948).

To rule contrarily would be to allow Respondents to informally encroach upon Petitioner's freedom of speech, protection of property, and freedom of association as an attorney at law as they could not do formally and legally under the Constitution and laws of the United States as agents of the State of Texas. *Hannegan v. Esquire*, 327 U.S. 146 (1946); *Rochin v. People of California*, 342 U.S. 165 (1952), and further to commit a tort without liability through a remedy at law. *Young v. Masci*, 289 U.S. 253 (1933).

Elijah W. Ratcliff

ELIJAH W. RATCLIFF,
Attorney At Law,
P. O. Box 391,
Livingston, Texas 77351,
Ph. 713 FA 7-4948,
Attorney for Petitioner.

APPENDIX A.

Filed 6-12-68.

IN THE SUPREME COURT OF TEXAS.

No. B-762.

ELIJAH WHITE RATCLIFF
versus
E. IVAN BRUCE, ET AL.

May 15, 1968

From Galveston County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Elijah White Ratcliff, and his sureties, D. M. White and Sibbie A. White, pay all costs incurred on this application.

No. B-762.

ELIJAH WHITE RATCLIFF
versus
E. IVAN BRUCE, ET AL.

June 5, 1968

From Galveston County,
Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 5th day of June, 1968.

GARSON R. JACKSON,
Clerk,
By JEWELL SEELIGER,
(Mrs. Jewell Seeliger),
Deputy.

THE STATE OF TEXAS,
COUNTY OF HARRIS.

I, RICHARD E. TISDALE, Clerk of the Court of Civil Appeals, Fourteenth Supreme Judicial District of Texas, at Houston, do hereby certify that the preceding 2 pages contain a true and correct copy of the Order of the Supreme Court of Texas in cause No. 10, ELIJAH WHITE RATCLIFF, APPELLANT, vs. E. IVAN BRUCE, ET AL, APPELLEES from Galveston County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Houston, this the 26th day of June, A.D. 1968.

RICHARD E. TISDALE,
(Seal) Clerk,
By .....,
Deputy.

APPENDIX B.

Court of Civil Appeals
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

Bert H. Tunks
Chief Justice

Richard E. Tisdale
Clerk

John M. Barron
Sam D. Johnson
Associate Justices

Phone
713 CA 8-8311 - Ext. 7291

February 7, 1968

Honorable Elijah W. Ratcliff
P. O. Box 391
Livingston, Texas 77351

Honorable V. W. McLeod
Messrs. McLeod, Alexander,
Powel & Apffel
808 Sealy & Smith Professional
Building
Galveston, Texas 77550

Honorable Crawford C. Martin
Attorney General
Honorable John H. Banks
Assistant
Box R, Capitol Station
Austin, Texas 78711

RE: 10, Elijah White Ratcliff v. E. Ivan Bruce, et al, from Galveston

Dear Sirs:

Please be advised that on this date in the above cause the Court OVERRULED appellant's motion for rehearing.

Respectfully,
RICHARD E. TISDALE,
(Richard E. Tisdale),
Clerk.

Affirmed, and opinion filed January 17, 1968.

No. 10.

ELIJAH WHITE RATCLIFF,
Appellant,

versus

E. IVAN BRUCE, ET AL.,
Appellees.

Appeal from District Court of Galveston County, Texas.

On September 3, 1964, the plaintiff in the trial court, appellant here, was admitted to John Sealy Hospital in Galveston, Texas, where he was examined and given psychiatric treatment until November 20, 1964. Plaintiff was admitted to the hospital on the authority of the defendant, Dr. E. Ivan Bruce. Plaintiff alleged that he was confined and treated without his consent and sought recovery of

compensatory and exemplary damages. The defendants, appellees here, are Dr. Truman Blocker, Jr., Executive Director and Dean of the University of Texas Medical Branch in Galveston, Texas, and Dr. E. Ivan Bruce, professor of psychiatry at the University of Texas Medical Branch in Galveston. The plaintiff, a licensed attorney, represented himself in the trial court and represents himself on appeal.

The trial court granted a motion for summary judgment in favor of the defendant, Dr. Truman Blocker, Jr. The jury found that on the occasion in question, the plaintiff was not confined to the hospital without his consent and the trial court rendered judgment on the verdict for the defendant, Dr. E. Ivan Bruce.

Plaintiff has appealed. The points of error upon which this appeal is based, are, briefly stated: (1) the court erred in granting the motion for summary judgment in behalf of the defendant, Blocker; (2) the court erred in overruling the plaintiff's challenge of a juror for cause; (3) the court erred in admitting, over plaintiff's objection, evidence offered by the defendant, Bruce, and in excluding, on defendant's objection, evidence offered by the plaintiff; (4) the court in refusing to permit plaintiff to file a trial amendment.

It is to be noted that no point of error challenges the sufficiency of the evidence to support the jury's findings that the plaintiff was not confined without his consent.

Neither Dr. Blocker's motion for summary judgment, the affidavits in support thereof nor the plaintiff's answer, if any, thereto, are included in the transcript. We therefore, obviously, cannot say that the trial court erred in granting the motion. However, the evidence shown in the statement of facts conclusively shows that Dr. Blocker, personally, did not have anything to do with the plaintiff's admission to the hospital nor with his treatment while he was there. The titles of the two defendants would indicate that Dr. Blocker was authorized to exercise some supervision over Dr. Bruce, but the plaintiff was a private patient of Dr. Bruce and there isn't even any suggestion in the record that Dr. Blocker had any supervision, whatever, over such activity of the professor. The evidence showed that Dr. Bruce had the privilege of accepting and treating private patients.

Even if it could be inferred that Dr. Blocker had some supervisory authority over the acceptance and treatment of patients by professors associated with the medical school and under his supervision, he was a state official and, as such, the doctrine of respondeat superior was not generally applicable so as to make him liable for the wrongful conduct, if any, of Dr. Bruce. State v. Morgan (Com.App.) 170 S.W. 2d 652; Tumlinson v. City of Brownsville, 178 S.W. 2d 546, err. ref.; Clough v. Worsham, 74 S.W. 350, err. ref.

The appellant's point of error that the trial court erred in rendering summary judgment for the appellee, Dr. Blocker, is overruled.

On voir dire examination of the jury panel by plaintiff, a member of the panel, Mrs. McDonald, said that her husband was a doctor. The following questions and answers were then made:

"Question: Do you think you could evaluate the conduct of a physician with his patient objectively in spite of the fact you are the wife of a physician?

"Answer: If you mean would I try to be a good juror, I would have to say 'Yes.'

"Question: In other words, do you believe that you would be successful in giving an honest verdict?

"Answer: I would try to be honest.

"Question: Thank you."

At the conclusion of the voir dire examination of the panel, the plaintiff proceeded to exercise his peremptory challenges by placing an "x" mark beside the names of eight jury panelists and turned in his jury list to the clerk in accordance with Rule 234, T.R.C.P. He was, of course, entitled to only six peremptory challenges. The clerk reproduced on the jury list the names of the first twelve jurors who had not been challenged, ignoring the plaintiff's challenge to Mrs. McDonald which, reading from the top of the list, was plaintiff's seventh peremptory challenge. Thereupon, the jury was sworn and seated in the jury box and those members of the panel not chosen were excused. It was then that, for

the first time, plaintiff announced to the court that he challenged Mrs. McDonald, as a juror, for cause. The court overruled the challenge.

We hold that the trial court did not err in overruling plaintiff's challenge for cause. Nothing in the record shows any disqualification per se of the juror. Article 2134, Sec. 4, V.A.T.S., provides that any person who has a biased or prejudiced opinion in favor of or against either of the parties to a lawsuit is disqualified to serve as a juror. Bias or prejudice is an intangible factor. Naturally, situations may arise under which a factual finding, on the basis of such intangibles, must be made as to whether the prospective juror, is, in fact, biased or prejudiced. Under those circumstances the trial court must make that fact finding. His overruling of a challenge for cause to the prospective jurors carries with it an implied finding that there exists no such bias or prejudice as to constitute a disqualification. That fact finding will not be disturbed in the absence of an abuse of discretion. Swap Shop v. Fortune, (Tex. Sup.Ct.), 365 S.W.2d 151; Allbright v. Smith (Com. App.) 5 S.W.2d 970; Bashrum v. Vinson, 330 S.W.2d 538, writ ref., n.r.e.

We are further of the opinion that the plaintiff's challenge for cause was not timely under the circumstances of this case. He was not entitled to stand by until he learned the result of the defendant's exercise of his peremptory challenges before he challenged a juror for cause, or otherwise.

Appellant's third point of error is in the following language:

> "The jury was prejudiced by the inconceivably flagrant abuse of the court's discretion in allowing it to consider certain inadmissible evidence offered by appellee and refusing to admit other evidence which was relevant offered by appellant."

This point obviously does not meet the requirements of Rule 418, T.R.C.P., in that it fails to direct the attention of the Court to any particular error relied upon. We have, however, considered each of the rulings of the trial judge in those instances where he ruled adversely to the plaintiff on the admission or exclusion of evidence. There is no reversible error in any of those rulings.

Plaintiff's second amended original petition, on which he went to trial, alleged that he was confined in the hospital and treated without his consent. It did not allege that the defendants, nor either of them, were guilty of any negligence which was a proximate cause of any injury to him. After both parties had rested, but before the charge was read to the jury, the plaintiff asked leave of court to file his third amended original petition. In that tendered pleading, he, for the first time, alleged, in general terms, that the defendant, Dr. Bruce, had been negligent in administering treatment to him and that such negligence was a proximate cause of injury to

him. The trial court denied leave to file the tendered pleading. The appellant complains by point of error. We overrule.

The only psychiatrist to testify in this case was the defendant, Dr. Bruce. He testified that the treatments given the plaintiff were in accordance with the procedures accepted by that school of practice of medical science as proper procedures in the treatment of the condition in which the plaintiff was. Dr. Bruce also testified that the treatments which he gave the plaintiff did not cause the plaintiff to suffer the loss of memory of which he was complaining. There was no testimony by any witness of the same school of practice as the defendant to the effect either that the defendant had used an improper method of treatment or that the treatment used was the cause of injury to the plaintiff. No evidence raising an issue of negligence or of proximate cause appears in the record. Bowles v. Bourdon (Tex. Sup. Ct.), 219 S.W.2d 779. The trial court, therefore, did not err in refusing to permit plaintiff to file his trial amendment. Kensinger v. McDavid, 380 S.W.2d 54, no writ history; Martin v. Shell Oil Co., 262 S.W.2d 564, no writ history.

This record reflects that the trial judge considerately and patiently extended to the plaintiff, representing himself, every opportunity to fully develop his case.

His opposing counsel, an able and experienced trial lawyer, carefully refrained from any overreaching or otherwise taking advantage of the situation. He went no farther than was necessary to protect the interests of his client. The record shows that the plaintiff had a fair trial and no reversible error was committed.

The judgment of the trial court is affirmed.

(S.) BERT H. TUNKS,
Chief Justice.

Judgment rendered, and opinion filed January 17, 1968.

APPENDIX C.

Court of Civil Appeals
First Supreme Judicial District
Harris County Civil Courts Building
Houston, Texas 77002

Spurgeon E. Bell
Chief Justice

Ewing Werlein
Tom F. Coleman
Associate Justices

(Mrs.) Rola Hamm
Clerk

Phone
CA 8-8311 - Ext. 7142

September 1, 1967

Hon. Elijah W. Ratcliff
P. O. Box 391
Livingston, Texas 77351

Messrs. McLeod, Alexander,
Powel & Apffel
Hon. V. W. McLeod
808 Sealy & Smith
Professional Building
Galveston, Texas 77550

Hon. Crawford C. Martin,
Attorney General
Hon. John H. Banks,
Assistant
Box R, Capitol Station
Austin, Texas 78711

Dear Sirs:

RE: 15136, Elijah White Ratcliff v. E. Ivan Bruce et al., from Galveston

Pursuant to the provisions of Senate Bill No. 261, Acts of the 60th Legislature, the above cause has been drawn by lot by the Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at Houston, and has this day been transferred to such Court.

Today I am delivering to the Clerk of said Fourteenth Court of Civil Appeals the complete record in the above cause together with a transcript of all orders entered by our Court therein together with the complete file of the correspondence pertaining to the case.

Respectfully,
ROLA HAMM,
Clerk.

APPENDIX D.

Court of Civil Appeals
First Supreme Judicial District
Harris County Civil Courts Building
Houston, Texas 77002

Spurgeon E. Bell
Chief Justice

(Mrs.) Rola Hamm
Clerk

Ewing Werlein
Tom F. Coleman
Associate Justices

Phone
CA 8-8311 - Ext. 7142

September 1, 1967

Hon. Elijah W. Ratcliff—pro se
P. O. Box 391
Livingston, Texas 77351

Mr. V. J. Beninati
District Clerk
Galveston County Courthouse
Galveston, Texas 77550

Miss Mary McGowan,
Court Reporter
56th District Court
Galveston County Courthouse
Galveston, Texas 77550

Hon. V. W. McLeod
808 Sealy & Smith
Professional Building
Galveston, Texas 77550

Hon. Crawford C. Martin,
Attorney General
Hon. John H. Banks,
Assistant
Box R, Capitol Station
Austin, Texas 78711

RE: 15182, Elijah White Ratcliff, Relator, v. V. J. Beninati et al., Respondents—ORIGINAL PROCEEDING

Dear Sirs:

Pursuant to the provisions of Senate Bill No. 261, Acts of the 60th Legislature, the above cause has been drawn by lot by the Clerk of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, at Houston, and has this day been transferred to such Court.

Today I am delivering to the Clerk of said Fourteenth Court of Civil Appeals the complete record in the above cause together with a transcript of all orders entered by our Court therein together with the complete file of the correspondence pertaining to the case.

Respectfully,
ROLA HAMM,
Clerk.

APPENDIX E.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES—ARTICLE V.

Trials For Crimes; Just Compensation For Private Property Taken For Public Use.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES—ARTICLE XIV, SECTION 1.

Citizenship Defined; Privileges Of Citizens.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 19 OF THE TEXAS CONSTITUTION.

Due Course Of Law.

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

STATE STATUTES.

Art. 1728. [1521] [940] [1011] Appellate jurisdiction

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the State.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

Art. 2249.

To Court of Civil Appeals. An appeal or writ of error may be taken to the Court of Civil Appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has exclusive jurisdiction, and from every final judgment of the county court in civil cases in which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars exclusive of interest and costs.

Art. 3713.

Rule 11. When a written instrument is lost, destroyed or mutilated, or is out of reach of a subpoena duces tecum, secondary evidence is admissible

Rule 67. Amendments to Conform to Issues Tried Without Objection

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of special issues, as is provided in Rules 277 and 279.

Rule 90. Waiver of Defects in Pleading

General demurrers shall not be used. Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by motion or exception in writing and brought to the attention of the Judge in the trial court before the instruction or charge to the jury or, in a non-jury case, before the rendition of judgment, shall be deemed to have been waived by the party seeking reversal on such account; provided that this rule shall not apply as to any party against whom default judgment is rendered.

Rule 166-A. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the

motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 169. Admission of Facts

At any time after the defendant has made appearance in the cause, or time therefor has elapsed, a party may deliver or cause to be delivered to any other party or his attorney of record a written request for the admission by such party of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth by the request. Copies of the documents shall be delivered with the request unless copies have already been furnished. Whenever a party is represented by an attorney of record, delivery of a request for admissions shall be made to his attorney unless delivery to the party

himself is ordered by the court. The request for admissions must state that it is made under this rule and that each of the matters of which an admission is requested shall be deemed admitted unless a sworn statement is delivered to the party requesting the admissions or his attorney as provided in this rule. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after delivery thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed delivers or causes to be delivered to the party requesting the admission or his attorney of record a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding. A true copy of a request for admissions or of a sworn statement in reply thereto, together with proof of the delivery thereof as provided in rule 21a, shall be filed promptly in the clerk's office by the party making such request or such sworn statement.

Rule 353. Notice of Appeal

(a) An appeal, when allowed by law, may be taken by notice of appeal (1) in open court, noted on the docket or embodied in the judgment, order

overruling motion for new trial, or other minute of the court, or (2) filed with the clerk; such notice to be given or filed within ten days after the judgment or order overruling motion for new trial is rendered.

(b) Such notice, when filed with the clerk, shall be sufficient if it state the number and style of the case, the court in which pending, and that appellant desires to appeal from the judgment, or from some designated portion thereof.

(c) No attempt to limit the scope of an appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a separate notice served upon such adverse party and filed with the clerk within fifteen days after judgment or order overruling motion for new trial is rendered.

Rule 354. Cost Bond

The appellant shall execute a bond to be approved by the clerk, payable to the appellee in a sum at least double the probable amount of the costs in the trial court and the cost of the statement of facts and transcript, to be fixed by the clerk, less such sums as may have been paid by appellant on the costs, conditioned that appellant shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the trial court and the cost of the statement of facts and transcript. Each surety on the bond shall give his post

office address. Appellant may make the bond payable to the clerk instead of the appellee, and same shall inure to the use and benefit of the appellee and the officers of the court, and shall have the same force and effect as if it were payable to the appellee; or in lieu of a bond, appellant may deposit with the clerk cash equal to the estimated costs in the trial court and the cost of the statement of facts and transcript, less such sums as have been paid by appellant on the costs, and in that event the clerk shall file among the papers his certificate showing that the deposit has been made and copy same in the transcript, and this shall have the force and effect of an appeal bond.

Rule 355. Party Unable to Give Cost Bond

(a) When the appellant is unable to pay the costs of appeal or give security therefor, he shall be entitled to prosecute an appeal by filing with the clerk his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.

(b) The appellant or his attorney shall forthwith give notice of the filing of such affidavit to the opposing party or his attorney.

(c) Any interested officer of the court or party to the suit, may, by sworn pleading, contest the affidavit within ten days after the giving of such notice whereupon the court trying the case (if in session) or (if not in session) the judge of the court or

county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the respective parties notice of such setting.

(d) Upon such hearing the burden of proof shall rest upon the appellant to sustain the allegations of his affidavit.

(e) Where no contest if filed in the allotted time the allegations of the affidavit shall be taken as true.

(f) Where the appellant is able to pay or give security for a part of the costs of appeal he shall be required to make such payment or give such security (one or both) to the extent of his ability.

Rule 356. Time for Filing Cost Bond

(a) Whenever a bond for costs on appeal is required, the bond shall be filed with the Clerk within thirty days after rendition of judgment or order overruling motion for new trial. If a deposit of cash is made in lieu of bond the same shall be made within the same period.

(b) The affidavit in lieu of bond shall be filed not more than twenty days after the date of rendition of such judgment or order. As amended by orders of March 31, 1941, effective Sept. 1, 1941; Oct. 10, 1945, effective Feb. 1, 1946; and March 19, 1957, effective Sept. 1, 1957.

Rule 386. Time to File Transcript and Statement of Facts

In appeal or writ of error the appellant shall file the transcript and statement of facts with the clerk of the Court of Civil Appeals within sixty days from the rendition of the final judgment or order overruling motion for new trial, or perfection of writ of error; provided, by motion filed before, at, or within a reasonable time, not exceeding fifteen days after the expiration of such sixty day period, showing good cause to have existed within such sixty day period why said transcript and statement of facts could not be so filed, the Court of Civil Appeals may permit the same to be thereafter filed upon such terms as it shall prescribe.

LIBRARY
SUPREME COURT, U. S.

FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

NO. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

ELIJAH WHITE RATCLIFF,

Petitioner

v.

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,

Respondents

MOTION TO DISMISS OR AFFIRM

McLeod, Alexander, Powel & Appel
Attorneys at Law
808 Sealy & Smith Professional Bldg.
200 University Blvd.
Galveston, Texas 77550

Crawford C. Martin
Attorney General of Texas

Nola White
First Assistant Attorney General

A. J. Carubbi, Jr.
Executive Assistant

J. C. Davis
Assistant Attorney General

John H. Banks
Assistant Attorney General

P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondents

INDEX

	Page
STATEMENT OF THE CASE	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
ARGUMENT	3
CONCLUSION	5
SERVICE	6
APPENDIX	7

CITATIONS

Cases:

Clough v. Worsham, 74 S.W. 350	3
French v. Hopkins, 124 U.S. 524	4
Gibson v. Mississippi, 162 U.S. 565	4
Iowa Cent. R. Co. v. Iowa, 160 U.S. 389	4
Lerner v. Casey, 357 U.S. 468	5
Ratcliff v. Bruce, 423 S.W.2d 614	2
Speiser v. Randall, 357 U.S. 513	5
State v. Morgan, 170 S.W.2d 652	3
Tumlinson v. Brownsville, 178 S.W.2d 546	3
Wood v. Brady, 150 U.S. 18	5

Statutes:

ARTICLE 2134, REVISED CIVIL STATUTES OF TEXAS, 1925	7
TEXAS RULES OF CIVIL PROCEDURE RULE 234	7
RULE 418	8



NO. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

ELIJAH WHITE RATCLIFF,

Petitioner

v.

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,

Respondents

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, E. Ivan Bruce and Truman Blocker, Jr., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the case be dismissed on the ground that the case does not present a substantial Federal question, and in the alternative, the Respondents, E. Ivan Bruce and Truman Blocker, Jr., moves that the judgment and decree of the Court of Civil Appeal for the Fourteenth Supreme Judicial District of Texas be affirmed on the ground that the questions are so unsubstantial as not to warrant futher argument.

STATEMENT OF THE CASE

This action is a malpractice suit which was instituted by Petitioner, Elijah White Ratcliff, for damages against E. Ivan Bruce and Truman Blocker, Jr., Respondents, for allegedly treating Petitioner at the Uni-

versity of Texas Medical Branch at Galveston, Texas, without his consent.

The facts of this case are stated in the opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, which opinion is set forth in Petitioner's Appendix B, at pp. 45-52, and is reported at 423 S.W.2d 614.

OPINIONS BELOW

This suit was filed in the 56th Judicial District Court of Galveston County, Texas. Motion for Summary Judgment was duly filed and presented on behalf of Respondent, Dr. Truman Blocker, Jr., and this motion was sustained. The case was tried on its merits, insofar as the Respondent Dr. E. Ivan Bruce was concerned, before a jury, and the jury found that Petitioner, Elijah White Ratcliff, was not treated without his consent. The Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, on January 17, 1968, affirmed the judgment of the trial court. The Supreme Court of Texas, on May 15, 1968, refused Petitioner's (Elijah White Ratcliff's) Application for Writ of Error (no reversible error). On June 5, 1968, Petitioners Motion for Rehearing of Application for Writ of Error was overruled by the Supreme Court of Texas.

JURISDICTION

It is asserted by Respondents that the Petition for Writ of Certiorari fails to comply with Rule 23(f) of the Supreme Court of the United States, in that the Petition does not specify the stage in the proceedings in the Court of first instance and in the Appellate Court or Courts, at which, and the manner in which, the Federal questions sought to be reviewed were

raised; the method of raising them; and the way they were passed on by the Court.

In the alternative, it is questioned by Respondents that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

STATUTES INVOLVED

The Statute and Texas Rules of Civil Procedure involved are produced in the appendix to this motion.

ARGUMENT

Petitioner brought a malpractice suit in the 56th Judicial District Court of Galveston County, Texas, against Respondents, Dr. E. Ivan Bruce and Dr. Truman Blocker, Jr., Executive Director of the University of Texas Medical Branch at Galveston, Texas, alleging that Petitioner had been treated without his consent and sought to recover damages in the amount of $660,000.00.

Respondent Dr. Truman Blocker, Jr., filed a motion for summary judgment which motion was sustained by the trial court. The State Court correctly held that under Texas law, Dr. Truman Blocker, Jr., the director of the University of Texas Medical Branch in Galveston, Texas, was not liable under respondeat superior for the acts or ommissions of subordinates. The Court of Civil Appeals cited as authority *State v. Morgan* (Tex.Com.App.), 140 Tex. 620, 170 S.W.2d 652 (1933); *Tumlinson v. City of Brownsville,* 178 S.W.2d 546 (Tex.Civ.App. 1944, err. ref.); *Clough v. Worsham,* 74 S.W. 350 (Tex.Civ.App. 1903, err. ref.). The case was tried on its merits before a jury, insofar as Dr. E. Ivan Bruce, is concerned, on the question of whether Dr. E. Ivan Bruce gave psychiatric treatment to Pe-

titioner without his consent. The jury found that Petitioner had consented to such treatment and the record abundantly supports the jury's findings.

Petitioner appealed the judgment of the Trial Court to the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas. The Court of Civil Appeals affirmed the judgment of the Trial Court. Petitioner appealed the decision of the Court of Civil Appeals by filing an application for Writ of Error with the Supreme Court of Texas. The Supreme Court of Texas refused to grant the application for Writ of Error on grounds that there was no reversible error. Petitioner filed a Motion for Rehearing with the Supreme Court of Texas, which motion was overruled.

The Petition for Writ of Certiorari should be dismissed or the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas affirmed because at no stage in the proceedings, either in the Courts of the first instance or in the Appellate Courts did the Petitioner raise any Federal questions, either by his pleadings, by a request to charge and exceptions, by assignment of error, or in any other manner, and it is respectfully submitted that this Petition for Writ of Certiorari should be dismissed or the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas affirmed.

The errors complained of by the Petitioner in the State Courts were procedural and evidentiary matters under Texas Rules of Procedure and the Texas Courts correctly overruled these alleged errors.

The cases are clear that a decision of a state court resting on grounds of state procedure does not present a Federal question. *French v. Hopkins,* 124 U.S. 524; *Iowa Cent. R. Co. v. Iowa,* 160 U.S. 389; *Gibson v.*

Mississippi, 162 U.S. 565; *Wood v. Brady,* 150 U.S. 18. The cases are also equally clear that the construction of state laws are the exclusive responsibility of state courts. *Speiser v. Randall,* 357 U.S. 513; *Lerner v. Casey,* 357 U.S. 468. Applying the foregoing principles to the instant case, the Respondents respectfully submit that there is no substantial Federal question presented.

The issues dealt with by the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas and the Supreme Court of Texas dealt with procedural and evidentiary matters, and no constitutional questions were raised, or passed on by the Texas Courts.

CONCLUSION

We respectfully submit that the Petitioner did not present a substantial Federal question and that this Petition for Writ of Certiorari should be dismissed or the judgment and decree of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas should be affirmed.

Respectfully submitted,

McLeod, Alexander, Powel & Appel
Attorneys at Law
808 Sealy & Smith Professional Bldg.
200 University Blvd.
Galveston, Texas 77550

Crawford C. Martin
Attorney General of Texas

Nola White
First Assistant Attorney General

A. J. Carubbi, Jr.
Executive Assistant

J. C. DAVIS
Assistant Attorney General

JOHN H. BANKS
Assistant Attorney General

P. O. Drawer R
Capitol Station
Austin, Texas 78711

Attorneys for Respondents

SERVICE

I, A. J. Carubbi, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that a copy of the foregoing Motion has been forwarded by United States Mail, First Class, postage pre-paid to Petitioner's Attorney, Mr. Elijah White Ratcliff, P. O. Box 391, Livingston, Texas 77351.

A. J. CARUBBI, JR.
Assistant Attorney General of Texas

APPENDIX

State Statutes

Art. 2134. Revised Civil Statutes of Texas, 1925.

"The following persons shall be disqualified to serve as jurors in any particular case:

"1. Any witness in the case.

"2. Any person interested, directly or indirectly, in the subject matter of the suit.

"3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.

"4. Any person who has a bias or prejudice in favor of or against either of the parties.

"5. Any person who has sat as a petit juror in a former trial of the same, or of another case, involving the same questions of fact."

Texas Rules of Civil Procedure

Rule 234

"When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased; and if the case be in the county court, he shall call off the first six names on the lists that have not been erased; those whose names are called shall be the jury.

"The brief for appellant should contain in the order here stated:

"(a) A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

"(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument, and germane to one or more assignments of error when assignments are required. Such points will be sufficient if they direct the attention of the court to the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. Assignments of error need not be copied in the brief, and may be cited by reference only.

"(c) A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided."

LIBRARY
SUPREME COURT, U. S.

FILED
NOV 2 1968
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 353

ELIJAH WHITE RATCLIFF,

Petitioner,

vs.

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

ELIJAH W. RATCLIFF,
Attorney At Law,
P. O. Box 862,
Livingston, Texas 77351,
Ph. 713 FA 7-4948,
Attorney for Petitioner.

V. W. McLEOD,
McLEOD, ALEXANDER, POWEL & APFFEL,
808 Sealy & Smith Professional Building,
200 University Boulevard,
Galveston, Texas 77550,
JOHN BANKS,
Assistant Attorney General of Texas,
Capitol Station,
Austin, Texas 78711,
Attorneys for Respondents.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 353

ELIJAH WHITE RATCLIFF,

Petitioner,

vs.

E. IVAN BRUCE AND TRUMAN BLOCKER, JR.,

Respondents.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner moves the Court to rehear his Petition for Writ of Certiorari filed in the Supreme Court of the United States on the 29th day of July, A.D. 1968, numbered 353

for the October Term, 1968, which Petition for Writ of Certiorari was denied on the 14th day of October, A.D. 1968, and in support of this petition would respectfully show the Court as follows:

I

Petitioner's case is primarily that Respondents have totally disregarded the enunciations of the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States of America by requiring him to remain within the definite limitations of the University of Texas Medical Branch at Galveston, Texas, while cases he had pending awaiting appellate review were being lost for failure to comply with Rules 353, 354, 355, 356 and 386 of the Texas Rules of Civil Procedure (See Appendix for Amendment XIII). The failure was a condition Petitioner was helpless to alleviate, and ulterior motives that influenced Petitioner's father and Respondents to bring about the confinement of Petitioner should not be ignored and accepted as insignificant or nonexistent (See Volume I, Statement of Facts, Record Instrument XII, p. 47). *A. Harris & Company* v. *Caldwell, et al.*, 276 SW 298 (1925). Whereas the law in Texas makes compliance with the aforementioned rules prerequisite to a completed appeal, Petitioner concludes that summary judgment in his favor would not have deprived Respondents of any legal rights as long as such summary judgment limited its effect to the issue of false imprisonment. *Wyche* v. *Works*, 373 SW2d 558 (1863).

II

Secondly, Petitioner emphasizes that after the District Court elected to try all issues of the case in a plenary proceeding, its ultimate judgment was a product of preju-

dice because of the erroneous admission of prejudicial and irrelevant evidence during substantially all direct and cross-examination by the attorney who represented Respondents during the trial as well as by the Court's refusal to admit certain letters into evidence offered by Petitioner which were, as an impeachment devise, an essential link in the establishment of negligence on the part of Respondents. The same is true of the Briefs of another Court proceeding offered into evidence by Petitioner. *Hussman* v. *Leavell & Sherman*, 20 SW2d 829 (1929).

III

Petitioner also complains of the refusal of the trial Court to permit the jury to consider special issues under Rules 67 and 90 of the Texas Rules of Civil Procedure covering specific negligence, intent and damages. *Stalnaker* v. *Howard*, 230 SW2d 563 (1950).

IV

Finally, Petitioner submits that the case as decided by the Texas judiciary should be reversed because of the rule established within the State by a decision which preceded the determination of Petitioner's case, and which is reasonable under the Federal Constitution, that a party deprived of a complete record material to his appeal without fault or negligence of himself or his counsel is entitled to reversal of the judgment for which he appealed. *Koonce* v. *City of Mesquite*, 382 SW2d 309 (1964).

Premises considered, Petitioner respectfully moves the Court to rehear his Petition for Writ of Certiorari and upon final hearing thereof to reverse the decision of the Supreme Court of Texas in this cause of action denying Petitioner's Application for Writ of Error and petitions

further that the cause be remanded to the Supreme Court of Texas with instructions to order the District Court to adjudicate the remaining issues not resolved by this Court.

.....

ELIJAH W. RATCLIFF,
Attorney At Law,
P. O. Box 862,
Livingston, Texas 77351,
Ph. 713 FA 7-4948,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I, Elijah W. Ratcliff, Attorney for Petitioner in the foregoing Petition for Rehearing of Petition for Writ of Certiorari, do solemnly declare and certify under the penalties of perjury that such Petition for Rehearing of Petition for Writ of Certiorari is presented in good faith and not for any purposes of delay, and the Petition is restricted to substantial grounds supporting the granting of the Petition for Writ of Certiorari which were not previously presented to the Court as reasons for granting the writ or as relief sought thereby, and that I have mailed a copy of this Petition this ..... day of ....., A.D. 1968, by first class United States Mail to the Attorneys of Record for Respondents at 200 University Boulevard in Galveston, Texas and Capitol Station in Austin, Texas.

.....

Attorney for Petitioner

APPENDIX

Amendments to the Constitution of the United States,

Article XIII

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have authority to enforce this article by appropriate legislation.